

Separation Agreements from A to Z

1. **PURPOSE:** To provide legal assistance clients with answers to routine questions regarding separation agreements.

2. **FACTS:**

Q. What is a separation agreement?

A. A separation agreement is a contract voluntarily entered into between a husband and a wife in which they agree to resolve such matters as property division, debts, custody, and support when they separate from each other. It must be signed by both parties in the presence of a notary public before it is valid. A separation agreement from the Legal Assistance Office is a "written legal separation" agreement - it is not a court ordered legal separation. The separation agreement you sign at the Legal Assistance Office is an agreement or contract between the parties that establishes legally enforceable duties and rights.

Q. Who prepares a separation agreement?

A. It is best to call your Legal Assistance Office for an appointment and have an attorney prepare one for you. Be aware that office policies and ethical considerations prohibit both parties from being seen by the same attorney. Both parties are entitled and encouraged to speak with and be counseled by separate and independent attorneys before they actually enter into any formal, binding agreement.

Q. Can we divide our property in a separation agreement?

A. Yes. A couple that is separating can agree upon a division of property in their separation agreement and that agreement will be binding between them. The property to be divided consists of real property (such as land and the buildings on it), tangible personal property (such as cars, jewelry, and furniture), and intangible personal property (such as bank accounts, stocks and bonds, pension or retirement interests, and life insurance).

Q. Does my spouse have to sign a separation agreement?

A. An "agreement" means that both parties sign voluntarily, without duress or coercion. You cannot force your spouse to sign a separation agreement or compel an agreement to the terms you wish to impose on him or her in the agreement.

Q. Do I really need a separation agreement?

A. The law does not require the parties to execute a separation agreement, but it is a wise idea if there are debts, children, support claims, or property involved, and the parties want to settle these matters in writing. A written separation agreement is beneficial because the legal rights and responsibilities of each spouse are specifically detailed.

Q. Does a separation agreement help me to get a divorce?

A. A separation agreement will usually facilitate court action by reducing the friction, costs, and time. The various states have different provisions in their laws which might make a divorce faster or easier if there is a separation agreement in which the parties have divided their property and arranged for payment of any debts of the marriage. Generally, if the parties have executed a separation agreement, only one needs to have an attorney and appear in court for the divorce hearing.

Q. If I have a separation agreement may I live with another individual?

A. Under law you are still considered "married." Only a court of competent jurisdiction has the ability to dissolve the marital status. Soldiers are subject to military law (UCMJ), and may be prosecuted for adultery, a crime punishable by Article 134, UCMJ, even if there is a separation agreement between the husband and wife. Civilian laws in CONUS do not make adultery a crime.

Q. Can we decide in our separation agreement how we will file taxes after we separate?

A. Yes. As long as you are married, you may file federal and state taxes either jointly or separately. If you file separately, one spouse will normally be permitted to deduct from gross income any sum paid to the other spouse as alimony or separate maintenance, but not amounts paid as child support. The spouse receiving alimony will have to report these sums as taxable income. The person who has custody of the child is entitled to claim the tax exemption for that child in the absence of an agreement to the contrary. However, the parties can determine who will get the tax exemption in the separation agreement.

Q. Can my spouse be charged with contempt of court if s/he violates the terms of the separation agreement?

A. No. It is not contempt of court to violate a separation agreement unless the agreement has been made a part of a court order or divorce decree. Contempt of court is failure to obey a court order without legal justification. You may, however, sue your spouse for breach of contract if s/he violates the separation agreement. Failure of a military member to honor family support provisions of a separation agreement may result in judicial or non-judicial punishment for a violation of a lawful general regulation (Article 92, UCMJ).

Q. How can I enforce the support provisions of my separation agreement without going to court?

A. Soldiers must comply with the terms of written separation agreements by AR 608-99. If you are not receiving support payments from a soldier in violation of an agreement, contact the military member's immediate commander and request enforcement. The commander cannot take the money directly from the soldier, but the commander can explain what the alternatives are, i.e. elimination from the service, filing of unfavorable information in official records, Article 15, adverse administrative actions under AR 635-200 or AR 635-100, or even court-martial. In the absence of a court decree or written separation agreement, the sponsor must normally provide the full amount of BAQ at the "with-dependents" rate. If there are multiple families to be supported, the support must be divided. Also there is the possibility of obtaining an involuntary support allotment under certain circumstances.

Q. Will a separation agreement free me from paying debts for which I have signed along with my spouse?

A. No. A separation agreement is only a contract between spouses. It cannot bind third parties (such as banks or finance companies) that have not signed it. However, if your spouse promises to pay a bill and then breaks that promise, and you have to pay it, you can then sue your spouse for breach of contract for the amount of money you had to pay. Furthermore, you and your spouse may agree that any debts you individually incur after the signing of the separation agreement are the obligation of the party who incurred it.

Q. Will a separation agreement stop my spouse from hassling me?

A. While separation agreements usually have a non-harassment clause in them, you should understand that no piece of paper - be it an agreement or a court order, is going to stop a person from doing something he or she is determined to do. If the problem is one of physical violence, a court order would be better than a separation agreement, and if violated, it could serve to punish

or jail the wrongdoer. If there is only an agreement, a lawsuit for breach of contract is one possible remedy for breaking the promise of not hassling each other.

Q. Is a court of law bound by what we put in the separation agreement about our children?

A. Not necessarily. The terms you include for child support, custody and visitation can always be altered by the court in the best interests of the children. Courts will generally adopt all the terms including the provisions for child support, custody, and visitation so long as the terms are reasonable. Finally, all states now have child support guidelines and will most likely apply these guidelines when determining child support.

Q. Can the court modify other terms we include in a separation agreement?

A. The terms in a separation agreement that pertain to division of property or adults will not be modified by the court except in very limited circumstances. For example, if the separation agreement has been incorporated in a court decree, the court normally has the power to modify the support terms (alimony or child support) based on a substantial change in circumstances. The party desiring the change has to show the court there has been a "substantial" change in circumstances. If the terms involve property division, the court can only modify terms executory in nature (i.e. those terms that have not yet been completed, such as transfer of car titles), not the executed or completed terms such as re-allocation of property already divided.

Q. Can a single attorney advise both me and my spouse regarding the separation agreement?

A. No. Two attorneys should be involved, one to advise each party. In this way, both the husband and the wife know that they have received independent legal advice from a lawyer who does not have a conflict of interest by representing two clients with different needs or goals. Even if both parties are agreeable on all terms, one legal assistance attorney will not, and cannot represent both parties.

Q. If I want to separate from my spouse, can I leave Japan without the sponsor's consent?

A. Yes. You can leave at your own expense at any time by purchasing a ticket with or without the knowledge or consent of the sponsor. You can leave at government expense without your spouse's consent (but with the sponsor's knowledge) by submitting a request to his or her commander (see the personnel office or CPO) for early return of family members. The commander will review the request, make a recommendation, and forward it to the installation commander or his designated representative for approval. Approval will be granted when justified by serious marital difficulties. Note that if you leave on "early return" orders at government expense, and you later reconcile, the government will NOT pay for your return to Japan.

Q. If we separate, can I remain in government quarters?

A. Government quarters are assigned to sponsors with accompanying family members only. If you are a family member and your sponsor moves out, you will be allowed up to 30 days to vacate government housing. If the sponsor is military, you may contact his commander for financial support in finding adequate living quarters. If you are the sponsor and all of your family members leave Japan, you will have to move to a BOQ or BEQ.

Q. Am I entitled to keep government furniture?

A. If your sponsor will agree to sign for the furniture, you may be able to use it in your economy quarters during the remainder of your sponsor's stay in Japan. Your sponsor remains liable for any damage during this time.

Q. Can I stay in Japan after separation?

A. As long as you are not divorced and you are still command sponsored, you will be considered an approved dependent under the SOFA. After a divorce is obtained, or upon the PCS or departure of your sponsor, you are no longer covered under the SOFA. You must have a passport and the required visa from Japanese officials unless you now qualify as your own "sponsor" (i.e. you have found qualifying employment with the US Forces). Any "no-fee" passports obtained from the military must be surrendered upon divorce.

Q. Can my spouse send me back to the United States against my will?

A. The sponsor can always follow the procedures and request early return of family members. However, you cannot be forced by US authorities to actually leave Japan and travel to the United States provided you have a valid passport. Should you decide to remain in Japan, you must make arrangements with Japanese immigration and comply with Japanese law. Finally, should you refuse travel at government expense (i.e. early return of family members), the installation commander may bar you from US installations (i.e. no entry, no PX, no commissary, no medical), and your loss of command sponsorship will be reported by US officials to Japanese immigration.

Q. Are my children still eligible for attendance at DODD schools?

A. The child is still authorized schooling as long as the sponsor is in Japan and agrees to sponsor the child. If the sponsor leaves Japan in mid-year, the child will usually be entitled to complete the school year on a tuition-free basis.

Q. Will I lose my job if I separate from my sponsor?

A. It depends on your job status. If you are employed in a "family member preference" appointment, you lose the "family member preference" when you separate from your sponsor. You will have up to 60 days to find a non-family member preference position or to convert your position to non-family member preference.

Q. Will the government transport me, my children, and our household items to the United States, and if so, how long will I have to use this privilege?

A. If family members are command sponsored, they will normally be authorized return transportation for themselves and their household goods to the United States at government expense. In some cases, it is possible for household goods in storage to be shipped to the same destination. This can be in connection with the sponsor's normal PCS. The transportation office should be consulted in each case. Transportation must be completed within one year of the date of divorce or annulment, or within six months after the sponsor's PCS, whichever event occurs first.

Q. What happens if my spouse objects to my taking the children to the United States?

A. This is a difficult and highly emotional problem. You must recognize that only a court of law can resolve child custody disputes. A military commander or the Legal Assistance Office cannot determine which spouse will have custody of minor children. If you and your spouse cannot resolve the problem, you have two options: (1) travel to the United States and seek a court ordered resolution, or (2) apply to the local Japanese courts for conciliation and resolution (if one spouse is Japanese). In both cases you must hire civilian counsel to represent your interests. Additionally, you must recognize that application to Japanese judicial authorities is difficult because of language and cultural differences, and it may be time consuming and expensive. Finally, commanders may curtail an overseas assignment of a military member and transfer both the military member and his or her family members to the United States.

Q. Am I entitled to medical, exchange, and commissary privileges following my separation?

A. As long as you remain married to a soldier you are entitled to a family member ID card. Children of military members are entitled to ID cards until age 18, or age 23 if attending college. As long as your sponsor is in Japan, you may use the PX, commissary, and medical facilities here. However should command sponsorship terminate (see above), or should your sponsor depart Japan, any unaccompanied dependents or family members retain in-country privileges for only 90 days. At the same time your privileges are normally limited to emergency medical care, theater, and recreational services. You must turn in the no-fee passport, obtain a regular passport, and comply with Japanese immigration and visa requirements. If you return to the United States, you will retain all privileges (PX, Commissary, CHAMPUS, DDP) until the date of divorce.

Q. Am I entitled to medical care after separation?

A. As long as your sponsor is stationed in Japan, family members are authorized to use all US Forces medical treatment facilities, including dental clinics. Once your sponsor PCS's or a divorce is granted, the former spouse loses medical care coverage and will qualify only for emergency medical care.

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